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No. 76-273

In the Supreme Court of the United States

OCTOBER TERM, 1976

AUSTIN L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was not given an opportunity to present a defense at trial.

Following a nonjury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment, to be followed by a special parole term of two years. The court of appeals affirmed without opinion (Pet. App. 1).

1. On January 10, 1975, federal agents received information from an informant that one Jeffrey Lloyd had journeyed from Florida to the McAllen, Texas, area in order to purchase marijuana. According to the informant, Lloyd was staying at the LaPosada Motor Hotel and had rented two automobiles, both of which the informant

described (App. Br. 3).[1] Following this lead, the agents learned that Lloyd had rented two rooms at the motel, in which he was registered with two other persons, and had rented three vehicles, one of which was special ordered to be used for out-of-state travel (App. Br. 3-4).

Two days later, the informant told the agents that one of the rented cars was parked in front of a bus station located near the motel and that the car appeared to be loaded, since it was riding low in the rear. The agents went to the bus station and located the automobile, which they determined appeared to be heavily loaded (App. Br. 4). Shortly after the agents arrived at the station, Lloyd appeared; he drove the car a short distance before he was stopped by agents. The agents searched the vehicle and found approximately 300 pounds of marijuana in the trunk. Lloyd was arrested and informed of his constitutional rights (App. Br. 5).

The agents then went to the motel with Lloyd to collect the latter's personal belongings. Lloyd told the agents that there were others waiting in the room who were probably armed, and he offered to enter first to prevent violence (App. Br. 5). When Lloyd and an agent entered, petitioner and several other men were in the room. The agent arrested petitioner and the others present in the room. The agents found three firearms, one in plain view, and a large sum of cash in the motel room (App. Br. 5-6).

Petitioner was tried before a judge without jury.

At the conclusion of the government's case, the court entertained motions for judgments of acquittal on behalf

[1]The government's brief in the court of appeals (App. Br.) sets forth the memorandum and order of the district court, ruling on Davis' motion to suppress evidence. A copy of this brief has been lodged with the Court.

of several defendants; in denying those motions, the court ruled on the merits of the case and entered judgments of conviction against petitioner and two co-defendants. A third co-defendant was acquitted.

2. Petitioner's contention that he was deprived of an opportunity to present a defense is not supported by the record.

The defense did not indicate at any point that it had witnesses whom it wished to call on petitioner's behalf. (See, *e.g.*, discussion concerning presence of witnesses and swearing of witnesses, Tr. 1-6).[2] Defense counsel, when asked if he wished to make an opening statement, gave no indication that he planned to present evidence on behalf of petitioner. Instead, he stated (Tr. 161): "We really have no opening statement."

The government presented its evidence, to which defense counsel raised objections on a number of occasions. The defense had previously lost a motion to suppress the fruits of the arrest and searches. After the government presented its evidence, petitioner's counsel moved for a judgment of acquittal on the ground that no showing had been made by the government of actual or constructive possession of the marijuana (Tr. 231). Petitioner's counsel presented argument in support of this motion. The trial court inquired of the other attorneys if they wished to speak (Tr. 234, 235, 238), and then asked if "anybody else want[ed] to say anything" (Tr. 241). Two counsel, including petitioner's counsel, responded

[2]"Tr." refers to the transcript of petitioner's trial in the district court on August 11, 1975.

with further argument concerning the inferences that could properly be drawn from the government's evidence. Petitioner's counsel reviewed the facts presented by the government and stated that they did not show actual or constructive possession of marijuana by the defendants. This argument was heard out by the trial court (Tr. 241-243). The court then found petitioner and two other co-defendants guilty as charged (Tr. 243-244).

Under the circumstances, the court had every reason to believe that the case was ready for decision after argument on the motion for judgment of acquittal.[3] The record indicates that petitioner's counsel at no time indicated that he wished to introduce evidence on petitioner's behalf; it also clearly shows that petitioner had ample opportunity to present and did present arguments concerning the strength of the government's case. Further, counsel for petitioner did not object after the ruling by the trial court, move to reopen, or in any other way signify that he wished to present evidence or make any further argument. Petitioner therefore cannot now complain that he was denied an opportunity to present a defense. In any event, petitioner has made no showing before the court of appeals or this Court of additional evidence or other defensive matter that he wished to raise at trial; there is therefore no indication that he suffered any prejudice.

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[3]Of course defendants may decline to introduce evidence on their own behalf, choosing instead to argue that the government has not met its burden of proving guilt beyond a reasonable doubt. Petitioner's counsel appears to have chosen this approach in the present case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

JANUARY 1977.